Kwong Hing Realty Sdn Bhd v Malaysia Building Society Bhd (American International Assurance Co Ltd, Third Party)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO F35 OF 1983
KC VOHRAH J
16 DECEMBER 1996

***Tort** — Trespass to land — Encroachment — Whether the fact that the trespasser did not construct the structure which encroached into the plaintiff's land was a significant consideration — Whether an easement was created to render the defendant's encroachment valid — Whether there was acquiescence on the part of the plaintiff to the presence of the structure which encroached into his land — Whether there was an absolute assignment of the previous owner's rights over the land — National Land Code 1965 ss 5, 206(1), (3), 286 & 341 — Civil Law Act 1956 s 4(3)*

The plaintiff was the owner of Wisma Hamzah-Kwong Hing ('Wisma HKH'), an 18-storey building, situated on Lot 135 ('Lot 135'). Its immediate neighbour was the eight-storey Malaysia Building Society Bhd ('the MBSB building'), owned by the defendant, situated on Lot 141 ('Lot 141'). Lot 141 was previously owned by Malaysia Borneo Building Society Ltd ('MBBSL') which subsequently sold all its properties in Malaysia to the defendant.

The plaintiff alleged encroachment of 58 square feet by the MBSB building of the land on which Wisma HKH stood at ground level. The plaintiff further alleged that the defendant had thus wrongfully taken possession of the land and the space above it, depriving the plaintiff of the use of 1,040 square feet of built-up area up to the 18th floor and that the defendant had thereby trespassed and was still trespassing thereon. The plaintiff consequently claimed for loss and damage arising from the trespass. It was not denied that the wall of the MBSB building ('the wall') had encroached over the common boundary into Lot 135 and that was recognized as far back as 1953.

The defendant denied it was liable and relied, inter alia, on the following, ie that: (i) it did not build the wall; (ii) by the terms of an agreement ('the 1973 agreement') between the plaintiff and the previous owner of Lot 135 ('the third party'), the plaintiff had purchased the lot subject to all conditions of title express or implied and all unregistered easements affecting the land; (iii) by the terms of an agreement entered in 1957 ('the 1957 agreement'), for a consideration, an irrevocable contractual licence was granted to MBBSL by the third party to use the wall as a means of support and to raise and carry up the wall to a height greater than its then height — the defendant further submitted that the contractual operation of the 1957 agreement fell within the saving provision of s 206(3) of the National Land Code 1965 ('the NLC'); (iv) the plaintiff was precluded from challenging the defendant's rights in and over the wall by the

representations, acquiescence, encouragement and inducement by the third party; and (v) the plaintiff's cause of action did not accrue within the appropriate period before the commencement of the action in accordance with the Limitation Act 1953.

The defendant also filed a claim against the third party in the event of the defendant being held liable to the plaintiff. The defendant claimed that in accordance with the provision of the 1957 agreement, the third party ought to cause the plaintiff to enter into a fresh agreement with the defendant with regard to matters concerning the wall. The issue was whether there was an absolute legal assignment of the rights under the 1957 agreement from MBBSL to the defendant. Arguments that there were mutual mistake of fact and uncertainty in the 1957 agreement were also raised.

Held, allowing the plaintiff's claim with costs and dismissing the third party claim of the defendant:

(1) Trespass to land consists of any unjustifiable intrusion by one person upon the land in the possession of another. Any trespass is actionable per se, there being no necessity for pure actual damage. Whether the defendant did or did not build the wall was of no importance in this case as there was no dispute that there was encroachment and if the encroachment was unjustifiable or unwarrantable, the defendant was liable (see p 678A–D); *Cheah Kim Tong & Anor v Taro Kaur* [1989] 3 MLJ 252 followed.

(2) The Federated Malay States Land Code had no provision for the creation of an easement except that the right of way. If any easement was intended to be created subject to the NLC, then the easement should have been registered in compliance with the provisions of s 286 of the NLC. Therefore, the defence that Lot 135 was subject to an easement was unfounded (see p 678E–G); *EW Talalla v Ng Yee Fong & Anor* [1985] 1 MLJ 261 followed.

(3) The 1957 agreement was not binding on the plaintiff and furthermore, the plaintiff was not privy to the agreement. Moreover, there was no proof of there being an absolute assignment to it from MBBSL which meant that the defendant was precluded from claiming any benefit, if any, existed, from the agreement. Therefore, the defence that there was an irrevocable contractual licence granted to the defendant by the third party could not succeed (see p 679B).

(4) The 1957 agreement did not fall within s 206(3) of the NLC. In fact, s 206(3) had to be read in the light of s 206(1) of the NLC. As s 206(1) speaks of 'dealing under this Act', the contractual operation of any transaction in s 206(3) must refer only to the contract which underlies the dealing referred to in the former provision; it does not speak of any dealing prior to the coming into force of the NLC. Therefore, s 206(3) only saves the contractual operation of dealings under the NLC and only applies

to such contracts entered into on or after the coming into force of the NLC on 1 January 1966. A

Further, whilst the general definition of 'dealing' under s 5 of the NLC includes 'any like transaction effected under the transaction of any previous land law', s 206(1) of the NLC explicitly limits it to dealings under the NLC only and s 206(1) prevails over the general definition in s 5 by virtue of the qualification therein unless the context otherwise requires (see p 679C–H). B

(5) To sustain an allegation of acquiescence in a state of things, it must be shown that there was knowledge of that state of things. It was quite clear from the provision of the 1973 agreement that the plaintiff had not acquiesced to the presence of the wall at the time of the purchase of Lot 135 (see p 680A–D); *Bell v Alfred Franks & Bartlett Co Ltd & Anor* [1980] 1 All ER 356 followed. C

(6) With regard to the limitation issue, regard must be had to the nature of the tort of trespass. It was sufficient to take cognizance of the principle that the tort of trespass is a continuing one. Therefore, the defence of limitation was also unfounded (see p 680E–G); *Cheah Kim Tong & Anor v Taro Kaur* [1989] 3 MLJ 252 followed. D

(7) The law of absolute assignment is governed by s 4(3) of the Civil Law Act 1956 ('the CLA'). There was no proof that the conditions or contingencies stipulated in the deed of assignment between the defendant and MBBSL were fulfilled to make the assignment absolute within the meaning of s 4(3) of the CLA. Furthermore, since the letter of 20 July 1981 from the defendants' solicitors to the third party did not qualify as an 'express notice in writing' within the meaning of s 4(3) of the CLA nor did it give any information relating to the assignment at all, there was no absolute assignment within the meaning of that provision (see pp 682H–I and 683A–C); *Novau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268, *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149, *Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1969] 1 QBD 607 and *Denne Gasquet and Metcalfe v Conklin* [1913] 3 KB 177 followed. E F G

(8) There was no mutual mistake in the 1957 agreement which rendered the agreement void in law. Moreover, the different clauses in the 1957 agreement must be read together and contextually. Hence, there was no inconsistency nor inherent uncertainty which was incurable (see pp 683E–F and 684C). H

[Bahasa Malaysia summary

Plaintif merupakan tuan punya Wisma Hamzah-Kwong Hing ('Wisma HKH'), sebuah bangunan 18 tingkat, yang terletak atas Lot 135 ('Lot 135'). Jiran yang terdekat adalah bangunan lapan tingkat Malaysia Building Society Bhd ('bangunan MBSB'), yang dimiliki I

A oleh defendan, yang terletak atas Lot 141 ('Lot 141'). Lot 141 dahulunya dimiliki oleh Malaysia Borneo Building Society Ltd ('MBBSL') yang kemudiannya menjual semua hartanya di Malaysia kepada defendan.

Plaintif mengatakan pencerobohan sebanyak 58 kaki persegi oleh B bangunan MBSB atas tanah di mana Wisma HKH berdiri pada aras bumi. Plaintif selanjutnya menghujahkan bahawa dengan itu defendan dengan salahnya telah merampas tanah dan ruang atasnya, lalu melucutkan plaintif daripada menggunakan kawasan seluas 1,040 kaki persegi sehingga tingkat ke-18 dan bahawa defendan telah menceroboh dan masih menceroboh. Plaintif kemudiannya menuntut kerosakan C dan ganti rugi yang berbangkit dari pencerobohan. Ia tidak dinafikan bahawa dinding bangunan MBSB ('dinding tersebut') telah menceroboh sempadan bersama ke Lot 135 dan ini telah dikenalpasti sejak tahun 1953.

Defendan menafikan ia bertanggungjawab dan bergantung, antara D lain, kepada yang berikut, iaitu bahawa: (i) ia tidak mendirikan dinding tersebut; (ii) menerusi terma suatu perjanjian ('perjanjian tahun 1973') antara plaintif dan pemilik dahulu Lot 135 ('pihak ketiga'), plaintif telah membeli lot tertakluk kepada semua syarat hakmilik nyata atau tersirat dan semua ismen yang tidak berdaftar yang menjejaskan tanah; (iii) melalui terma suatu perjanjian yang E diikat dalam tahun 1957 ('perjanjian tahun 1957'), suatu lesen kontraktual yang tak boleh batal telah diberikan sebagai balasan kepada MBBSL oleh pihak ketiga untuk menggunakan dinding tersebut bagi menyokong dan menaikkan serta membawa dinding tersebut ke paras yang lebih tinggi daripada ketinggian pada masa itu F — defendan seterusnya menghujahkan operasi kontraktual perjanjian tahun 1957 dirangkumi oleh peruntukan s 206(3) Kanun Tanah Negara 1965 ('KTN'); (iv) plaintif dikecualikan daripada menentang hak defendan dalam dan atas dinding tersebut oleh representasi, akuiesens, galakan dan dorongan oleh pihak ketiga; dan (v) kausa tindakan plaintif tidak terakru dalam tempoh yang wajar sebelum G permulaan tindakan menurut Akta Had Masa 1953.

Defendan juga memfailkan suatu tuntutan terhadap pihak ketiga sekiranya defendan didapati bertanggungjawab terhadap plaintif. Defendan menuntut bahawa menurut peruntukan perjanjian tahun 1957, pihak ketiga seharusnya menyebabkan plaintif mengikat suatu H perjanjian baru dengan defendan berhubung dengan perkara mengenai dinding tersebut. Isu adalah sama ada terdapat suatu penyerahhakan mutlak hak yang sah di bawah perjanjian tahun 1957 daripada MBBSL kepada defendan. Hujah bahawa terdapat silap fakta bersama dan ketidakpastian dalam perjanjian tahun 1957 juga dibangkitkan.

I **Diputuskan**, membenarkan tuntutan plaintif dengan kos dan menolak tuntutan pihak ketiga defendan:

(1) Pencerobohan tanah terdiri daripada mana-mana pencerobohan yang tidak dapat dijustifikasikan oleh seseorang atas tanah yang

dimiliki oleh orang lain. Sebarang pencerobohan boleh didakwa per se, kerana tiadanya keperluan untuk kerosakan sebenar semata-mata. Sama ada defendan telah membina dinding tersebut atau tidak bukan penting dalam kes ini kerana tiada pertikaian bahawa terdapat pencerobohan dan jika pencerobohan tidak dapat dijustifikasikan atau tidak wajar, defendan adalah bertanggungjawab (lihat ms 678A–D); *Cheah Kim Tong & Anor v Taro Kaur* [1989] 3 MLJ 252 diikut.

(2) Kanun Tanah Negeri-negeri Melayu Bersekutu tidak mempunyai peruntukan untuk kewujudan suatu ismen kecuali hak lalu-lalang. Jika sebarang ismen ingin diwujudkan tertakluk kepada KTN, maka ismen itu patut didaftarkan mematuhi peruntukan s 286 KTN. Oleh itu, pembelaan bahawa Lot 135 adalah tertakluk kepada suatu ismen tidak berasas (lihat ms 678E–G); *EW Talalla v Ng Yee Fong & Anor* [1985] 1 MLJ 261 diikut.

(3) Perjanjian tahun 1957 tidak terikat atas plaintif dan tambahan lagi, plaintif tidak privi kepada perjanjian. Tambahan pula, tiada bukti terdapat penyerahhakan mutlak kepadanya daripada MBBSL yang bermakna bahawa defendan dikecualikan daripada menuntut sebarang manfaat yang wujud, jika ada, berbangkit dengan perjanjian. Maka, pembelaan bahawa suatu lesen kontraktual tak boleh batal telah diberikan kepada defendan oleh pihak ketiga tidak mungkin berjaya (lihat ms 679B).

(4) Perjanjian tahun 1957 tidak dirangkumi oleh lingkungan maksud s 206(3) KTN. Malah, s 206(3) mesti dibaca berdasarkan s 206(1) KTN. Oleh kerana s 206(1) menyebut tentang 'urusniaga di bawah Akta ini', operasi kontraktual mana-mana transaksi dalam s 206(3) mesti merujuk hanya kepada kontrak yang mendasari urusniaga yang dirujuk dalam peruntukan sebelumnya; ia tidak menyebut tentang sebarang urusniaga sebelum penguatkuasaan KTN. Maka, s 206(3) hanya menyelamatkan operasi kontraktual urusniaga di bawah KTN dan hanya terpakai kepada kontrak demikian yang diikat pada atau selepas penguatkuasaan KTN pada 1 Januari 1966.

Seterusnya, manakala takrifan am 'urusniaga' di bawah s 5 KTN termasuk 'apa-apa transaksi yang serupa yang dikuatkuasakan di bawah peruntukan mana-mana undang-undang tanah terdahulu', s 206(1) KTN menghadkannya secara eksplisit kepada urusniaga di bawah KTN sahaja dan s 206(1) mengatasi takrifan am dalam s 5 disebabkan syarat di dalamnya melainkan konteks menghendaki sebaliknya (lihat ms 679C–H).

(5) Untuk mengekalkan pengataan akuiesens dalam keadaan, ia mesti ditunjukkan bahawa terdapat pengetahuan tentang hal-ehwal keadaan. Adalah amat jelas daripada peruntukan perjanjian tahun 1973 bahawa plaintif telah tidak mengakur kepada kehadiran dinding tersebut sewaktu membeli Lot 135 (lihat ms 680A–D);

Bell v Alfred Franks & Bartlett Co Ltd & Anor [1980] 1 All ER 356 diikut.

(6) Berhubung dengan isu had masa, jenis tort pencerobohan mestilah diambil kira. Adalah memadai untuk mengambil tahu tentang prinsip bahawa tort pencerobohan merupakan suatu tort yang kekal. Oleh itu, pembelaan had masa juga tidak berasas (lihat ms 680E–G); *Cheah Kim Tong & Anor v Taro Kaur* [1989] 3 MLJ 252 diikut.

(7) Undang-undang penyerahhakan mutlak dikuasai oleh s 4(3) Akta Undang-Undang Sivil 1956 ('AUS'). Tiada bukti bahawa syarat-syarat atau kontingensi yang ditetapkan dalam suratikatan penyerahhakan defendan dan MBBSL telah dipenuhi bagi menjadikan penyerahhakan mutlak dalam maksud s 4(3) AUS. Tambahan pula, memadangkan surat bertarikh 20 Julai 1981 daripada peguamcara defendan-defendan kepada pihak ketiga tidak layak sebagai 'notis nyata bertulis' dalam maksud s 4(3) AUS dan tidak juga memberi sebarang maklumat tentang penyerahhakan itu sama sekali, tiada apa-apa penyerahhakan mutlak dalam maksud peruntukan itu (lihat ms 682H–I dan 683A–C); *Novau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268, *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149, *Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1969] 1 QBD 607 dan *Denne Gasquet and Metcalfe v Conklin* [1913] 3 KB 177 diikut.

(8) Tiada kesilapan bersama dalam perjanjian tahun 1957 yang menyebabkan perjanjian itu terbatal di sisi undang-undang. Tambahan lagi, fasal-fasal yang berbeza dalam perjanjian tahun 1957 mesti dibaca bersama dan mengikut konteks. Justeru itu, tiada apa-apa ketidaktekalan atau ketidakpastian sedia ada yang tidak boleh dipulihkan (lihat ms 683E–F dan 684C).]

Notes

For cases on trespass to land, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 936–973.

Cases referred to

Bell v Alfred Franks & Bartlett Co Ltd & Anor [1980] 1 All ER 356 (folld)
Cheah Kim Tong & Anor v Taro Kaur [1989] 3 MLJ 252 (folld)
Denne Gasquet and Metcalfe v Conklin [1913] 3 KB 177 (folld)
EW Talalla v Ng Yee Fong & Anor [1985] 1 MLJ 261 (folld)
Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd [1989] 2 MLJ 149 (folld)
Novau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268 (folld)
Van Lynn Developments Ltd v Pelias Construction Co Ltd [1969] 1 QBD 607 (folld)

Legislation referred to

Civil Law Act 1956 s 4(3)
Contracts Act 1950 ss 21, 32
Limitation Act 1953
National Land Code 1965 ss 5, 206(1), (3), 286, 341

Manjit Singh (*Fiona M Bodipalar* with him) (*Sri Ram & Co*) for the plaintiff.

N Chandran (*Ranjit Singh Virik*) (*Adnan Sundra & Low*) for the defendant.

DJ Puthucheary (*Mubashir bin Mansor* with him) (*Skrine & Co*) for the third party.

Cur Adv Vult

KC Vohrah J: When Wisma Hamzah-Kwong Hing ('Wisma HKH'), 18 storeys high, was completed at one corner of Leboh Ampang, it dwarfed its immediate neighbour, the eight-storey Malaysia Building Society Bhd building ('the MBSB building'). The plaintiff, the owner of Wisma HKH, claimed encroachment of 58 square feet by the MBSB building of the land on which Wisma HKH stands at ground level. The plaintiff claimed that the owner of the MBSB building had wrongfully taken possession of the said land and the space above it, depriving the plaintiff of the use of 1040 square feet of built-up area up to the 18th floor and that the defendant had thereby trespassed and was still trespassing thereon.

The plaintiff consequently claims for loss and damages arising from the trespass.

Background

A historical sketch needs to be given for the legal issues to be seen in their context.

In 1956 a company, Malaysia Borneo Building Society Ltd ('MBBSL'), incorporated in Singapore, bought Lot 141 (then known by a different number) and at the time of the purchase, there was in existence a wall part of which was on MBBSL's lot and the rest on the third party's lot (Lot 135, then known by a different number).

On 25 February 1957 ('the 1957 agreement'), MBBSL and the third party entered into a written agreement where, inter alia, the third party granted to MBBSL — in consideration of the sum of RM3,000 — an irrevocable contractual licence to use the said wall as a means of support and to raise and carry up the said wall to a height greater than its height.

In 1971, through an agreement, MBBSL sold to a Malaysian company, the defendant, the whole of its undertaking's operations and all its property and assets. In a supplemental agreement, by a deed of assignment, MBBSL purported to assign, inter alia, the full benefit of all guarantees, charges, securities, powers, right and remedies expressly or impliedly conferred on MBBSL.

A In 1973 by an agreement ('the 1973 agreement') the plaintiff purchased from the third party lands which comprised, inter alia, Lot 135. Among the terms in the agreement was that the plaintiff had purchased the said land subject to all conditions of title express or implied and all unregistered easements affecting the land.

B The plaintiff was the owner of 15 other lots in the vicinity. After the purchase of Lot 135, the plaintiff decided to demolish the four-storey building on Lot 135 which was standing next to the MBSB building and the buildings in the other lots to make way for Wisma HKH.

Clearly, there can be no dispute that the wall of the MBSB building in Lot 141 running east-west along the boundary of Lot 141 (of the C defendant) and Lot 135 (of the plaintiff) had encroached over the common boundary into Lot 135 and that was recognized as far back as 1953.

The complaint is that because of the encroachment, the plaintiff could not build Wisma HKH higher than 18 storeys and that it affected adversely the area of lettable space that could have been realized had there D been no encroachment.

The defendant — while not disputing the encroachment at ground level and the encroachment up to the eighth storey, the height of its own building — contended that there was no encroachment beyond the eighth storey over the boundary as the plaintiff was free to build up to the E boundary which was free space from the ninth storey onwards.

The plaintiff's claim

The plaintiff's action against the defendant is in trespass. The defendant denies it was liable and relied on the following, ie that:

F (i) it did not build the wall;

(ii) by the terms of the 1973 agreement, the plaintiff purchased Lot 135 subject to all conditions of title express or implied and all unregistered easements affecting the land;

G (iii) by the 1957 agreement, for a consideration, an irrevocable contractual licence was granted to the defendant by the third party to use the wall as a means of support and to raise and carry up the wall to a height greater than its then height;

(iv) the plaintiff was precluded from challenging the defendant's rights in and over the said wall by the representations, acquiescence, H encouragement and inducement by the third party; and

(v) the plaintiff's cause of action did not accrue within the appropriate period before the commencement of this action in accordance with the Limitation Act 1953.

I So far as the third party is concerned, the defendant claimed from the third party a right to be indemnified due to the fact that cl 8 of the 1957 agreement provided that should either party to the 1957 agreement sell its respective lots it would request the purchaser to enter into a fresh agreement confirming and accepting the terms of the 1957 agreement.

As is stated in *Clerk & Lindsell on Torts* (17th Ed) at p 837, trespass to land consists of any unjustifiable intrusion by one person upon the land in the possession of another. What is relied on for this principle is one of the earliest commentaries on the subject, Bl Comm, Vol 3 209:

> Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close; the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit*. For every man's land is in the eye of the law inclosed and set apart from his neighbours; and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field.

As was reiterated by Peh Swee Chin J (as he then was) in *Cheah Kim Tong & Anor v Taro Kaur* [1989] 3 MLJ 252 at p 253, any trespass is actionable per se, there being no necessity to prove actual damage.

There being admitted intrusion, is the intrusion justifiable or warrantable?

The issue of whether the defendant did or did not build the wall is not relevant as there is no dispute that there is encroachment and if the encroachment is unjustifiable or unwarrantable, the defendant is liable.

As to the defence that Lot 135 is subject to an easement since the 1973 agreement subjected the purchase to all conditions of title and all unregistered easements affecting the land, though the wall existed even before 1957 in the then State of Selangor where the FMS Land Code governed land law in the State, it was clear that the Code had no provision for the creation of an easement except that of the right of way and this is made clear in *EW Talalla v Ng Yee Fong & Anor* [1985] 1 MLJ 261 at p 264:

> The National Land Code came into force in 1966. The question arises whether easement had been created under the law in force before the National Land Code, ie the Land Code (FMS Cap 138). In that old Land Code, there was no provision relating to creation of easement except for a right of way. Therefore, in this case, no easement could have been created before the National Land Code came into force.

If any easement was intended to be created subject to the National Land Code 1965 ('the NLC'), then the easement should have registered in compliance with the provisions of s 286 of the Code.

As regards the defence that there is an irrevocable contractual licence granted to the defendant by the third party to use the wall, reference is made to the fact that the plaintiff agreed to purchase Lot 135 under the 1973 agreement subject, inter alia, to 'all unregistered easements affecting Lot 135 and in consequence must be bound by that covenant vis-as-vis the third party'. There is also the averment that the plaintiff is bound by the 1957 agreement and that the plaintiff could not have obtained a better right than what its predecessor in title had or could grant. It is argued while s 206(1) of the NLC requires proper instruments and procedures to be used before dealings are properly registered under it, s 206(3) provides that nothing in that provision shall affect the contractual operation of any transactions relating to alienated land or interest therein. It is argued that

A the plaintiff, having entered into a contract with the third party, takes Lot 135 subject to the contractual licence relating to the unregistered easement.

I agree with the plaintiff that that defence cannot stand. Firstly, the plaintiff was not privy to the 1957 agreement and the agreement is not binding on the plaintiff. Secondly, the defendant not being party to the B 1957 agreement and there being no proof of there being an absolute assignment to it from MBBSL, the defendant is precluded from deriving any benefit, if any exists, from the agreement. As regards the matter of there being no assignment to the defendant by MBBSL, that is discussed under the third party claim.

C As regards the application of s 206(3) of the NLC, I agree with the third party's argument that the 1957 agreement does not fall within its ambit. Section 206(3) of the NLC provides:

> Nothing in subsection (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein.

D Section 206(3) of the NLC has to be read in the light of s 206(1) of the NLC. Section 206(1) of the NLC provides:

> (1) Subject to the following provisions of this section —
> (a) every dealing under this Act shall be effected by an instrument complying with the requirements of sections 207 to 212; and
> (b) no instrument effecting any such dealing shall operate to transfer E the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Part Eighteen.

I accept the view of the third party that the fact that s 206(1) of the NLC speaks of 'dealing under this Act', the 'contractual operation of any F transaction' in s 206(3) of the NLC must refer only to the contract which underlies the dealing referred to in the former provision; it does not speak of any dealing under the NLC or prior to the coming into force of the NLC and therefore s 206(3) of the NLC only saves the contractual operation underlying the dealing under the NLC and only applies to such G contracts entered into on and after the coming into force of the NLC on 1 January 1966. I agree with the fortifying argument that whilst the general definition of 'dealing' under s 5 of the NLC includes 'any like transaction effected under the provision of any previous land law', s 206(1) of the NLC explicitly limits it to dealings under the NLC only and s 206(1) H prevails over the general definition in s 5 by virtue of the qualification therein 'unless the context otherwise requires'.

As to the matter of acquiescence, the defendant argued that the plaintiff bought Lot 135 on an 'as is where is' basis and had acknowledged having inspected the land before the purchase, the wall having been there before the purchase and the plaintiff had not objected and therefore must be I deemed to have acquiesced to the presence of the wall in the position it was in. The reference to the acknowledgement that the plaintiff had inspected the premises must be a reference to cl 10 of the 1973 agreement which states, inter alia, that the 'said lands together with building thereon shall be deemed to have been inspected by the Purchaser ... .'

To sustain an allegation of acquiescence in a state of things, it must be shown that there was knowledge of that state of things. As was pointed out by Shaw LJ in *Bell v Alfred Franks & Bartlett Co Ltd & Anor* [1980] 1 All ER 356 at p 360:

> What's meant by acquiescence? It may involve no more than a merely passive attitude, doing nothing at all. It requires as an essential factor that there was knowledge of what was acquiesced in.

The deeming provision of cl 10 of the 1973 agreement notwithstanding, the managing director of the plaintiff company stated that when the plaintiff bought the property in January 1973, the plaintiff was not aware of any agreement entered into between the defendant and the third party over the wall. He said:

> Whatever [was] visible to the eyes [was] with regard to the lands and the buildings we saw. I only said that when we wanted this four-storey building and we saw that it was [a] four-storey one then we proceeded to buy. After we purchased the four-storey building, we had it demolished. After the demolition, we discovered the piling of the MBSB [building] had encroached into our land.

It is quite clear the plaintiff had not acquiesced to the presence of the wall at the time of the purchase of Lot 135.

Finally, with regard to the limitation issue, regard must be had to the nature of the tort of trespass. As was observed by Peh Swee Chin J again in *Cheah Kim Tong & Anor v Taro Kaur* at p 253, as regard the nature of trespass:

> Next, it was submitted that the plaintiffs' action was barred by limitation of time, ie s 9(1) of the Limitation Act 1953. ...
>
> Learned counsel for the plaintiffs submitted that the trespass was a continuing one, and still continued. I agree with the submission about the continuing trespass. In a continuing trespass, a fresh cause of action arises *di die in diem*, ie from day to day. This would alone dispose of the defendant's contention.

There is also a reference to s 341 of the NLC in the case but to my mind it is sufficient to take cognizance of the principle that the tort of trespass is a continuing one.

It is a fact that the wall of the MBSB building invades the air space of Lot 135 vertically to the roof of the eighth floor. Above the roof of the eighth floor there is in fact no intrusion of the air space above Lot 135.

There was no evidence adduced to show that it was impossible for the plaintiff to have raised the level of Wisma HKH above the roof level of the eighth floor and use the air space up to the boundary line corresponding with the boundary line between the two lots. That being so, in my view, the plaintiff can only succeed in damages to the extent of the actual damage proved up to the eighth floor of Wisma HKH. In fact the evidence of the defendant's witness, En Abdul Razak Khalidon, an architect, was that if a cantilever method had been employed for Wisma HKH there would not have been incurred loss of area from the eighth floor upwards.

Several witnesses testified as to the loss of lettable space and produced their reports and calculations relating to the loss and the quantum of damages involved with the loss. Encik Abdul Halim — who is a Fellow of the Institute of Surveyors and a valuer since 1970, and who did actual measurements on site and compared them with the measurements of relevant building plans — gave a clear report as regards the determination of the loss of lettable space and in my view his testimony and the report should form the basis of this court's determination of the loss.

According to the report using the maximum encroachment of 9.24 inches (0.77 foot), the total lettable area was 15.4 sq feet and using the comparison method of valuation based on the market rental of office space for nine office buildings in Kuala Lumpur in 1985, a long-term forecast of RM3 per square foot was arrived at. Outgoings of services and insurance which were put at a reasonable 75 sen per square foot after comparison with other office buildings had, however, to be taken into account. Since the market was in an over-supply situation, the forecast for occupancy for the following few years was poor and noting the actual occupancy rate for Wisma HKH for 1984, 1985 and 1986, an acceptable 10% void was adopted. There was an analysis of the capitalization rate of some office buildings in 1989 and 1991 — there being no comparable sales of office buildings in 1983 and 1984 — and a reasonable rate of 7% was arrived at. The market value was arrived at RM334.15 and the calculations taken from the report are reproduced below:

Market rental per sq foot per month			RM	3
				x 12
Gross rental (Income) per sq foot per annum			RM	36
Less				
Outgoings (0.75 x 12)	RM	9.00		
Voids (10% of RM36)	RM	3.60		
Total	RM	12.60	RM	12.60
Net rental (Income)			RM	23.40
Capitalization rate @ 7%			RM	14.28
Market value per sq foot			RM	334.15

A comparison of this market value (rounding it up at RM335) in an over-supply situation in 1984 with the market value derived from transactions involving some 23 office buildings from 1988–1990 including two buildings sold during the boom period (Bangunan Arab Malaysia — RM361 per square foot and Plaza MBf — RM401 per square foot) shows the derived value to be quite fair.

From this amount has to be deducted the cost of development which includes cost of construction, professional fees, statutory payment, finance charges and such like and this was estimated at a fair RM150.

The loss incurred and compensation payable for loss of lettable space resulting from reduction in lettable floor area is thus RM185 per square foot.

The loss for eight floors would be 15.4 sq feet x 8 floors x RM185 per square foot. The loss thus amounts to RM22,792.

No evidence was adduced to show that the delay in the completion of construction works on the plaintiff's land arose through the defendant's fault and there was no evidence either relating to the costs of replacement and repairs of certain items as claimed in the plaintiff's prayer.

Third party claim

In the third party claim, the defendant claimed, in the event of the defendant being held liable to the plaintiff, that it is entitled to be indemnified by the third party against the claim of the plaintiff. The defendant relies on the 1957 agreement made between MBBSL and the third party where the third party — in consideration of RM3,000 — allowed MBBSL to use the wall as a means of support of the defendant's building subject to some terms and conditions, one of which was that in the event of either party selling their respective land to some other person they would request such other person to enter into a fresh agreement with the other party. The defendant claimed that the third party did not cause the plaintiff to enter into a fresh agreement with the defendant.

The third party's defence was that the 1957 agreement was made between the third party and MBBSL and not the defendant.

The third party also stated that with the coming into force of the NLC in 1966 the third party was discharged from any contractual or other obligation in respect of the said land and it also raised the issue of limitation.

What is to be first noted is that the 1957 agreement was between the third party and MBBSL. The defendant was not a party to the agreement. That being so, the next question to ask is whether there has been an absolute legal assignment of the rights under the agreement from MBBSL to the defendant. In regard to the issue of absolute legal assignment, there is in the defendant's bundle of documents ('AB') the agreement between the defendant and MBBSL dated 20 December 1971 (marked as D9) and the deed of assignment between the defendant and MBBSL dated 1 March 1972 (marked as exh D10).

The law of absolute legal assignment is governed by s 4(3) of the Civil Law Act 1956 ('the CLA') (see the Federal Court case of *Novau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 and later the (then) Supreme Court case of *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149). What is to be noticed in D9 (at p 11 of AB) upon which exh D10 is based is that the assignment was subject to the fulfilment of two conditions; namely, the approval of the requisite majority of the holders of the ordinary stocks and preference shares of MBBSL and the approval by the High Court of the Republic of Singapore. Exhibits D9 and D10 are essentially therefore contingent contracts within the

meaning of s 32 of the Contracts Act 1950. I agree with the third party that there is no proof that the conditions or contingencies have been fulfilled to make the assignment absolute within the meaning of s 4(3) of the CLA.

I also agree with the third party that in any event the defendant has also failed to prove that at all material times prior to the commencement of the proceedings either the defendant or MBBSL had given an 'express notice in writing' within the meaning of s 4(3) of the CLA of the purported assignment to the third party and therefore there is no absolute legal assignment within the meaning of that provision. Although there is a letter dated 20 July 1981 from the defendant's solicitors to the third party (at p 37 of bundle AB), the letter does not qualify as such notice rests on the erroneous assumption that the defendant was a party to the agreement dated 25 February 1957. The letter did not give any information relating to the assignment at all (see *Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1969] 1 QBD 607 and *Denne Gasquet and Metcalfe v Conklin* [1913] 3 KB 177).

In the event I am wrong and for completeness, I need to consider several other arguments put up by the third party.

I first go to the argument by the third party relating to mutual mistake in the 1957 agreement as to the wall being half on the third party's land and half being on MBBSL's land, whereas the evidence does not show that. The argument is that both MBBSL and the third party were labouring under a factual misconception that the wall was half on MBBSL's land and half on the third party's land and all the provisions relating to maintenance and repair costs being borne by both parties equally went on that misconception. It was a concept that was essential to the said agreement — there was a mutual mistake of fact — and is in law void as contravening s 21 of the Contracts Act 1950. I do not agree. Reliance was placed on the third recital of the 1957 agreement to show that the wall was equally divided at the boundary but a closer look at the third recital shows reference to the provisions of an earlier agreement made on 30 January 1953 between the predecessor in title where the wall 'was build as to one half thereof upon the said Lot No 135 and as the other half upon the adjoining Lot No 141 under and in accordance with the provisions of an agreement in writing dated 30 January 1953'. The precise nature of 'half' is not known since the 1953 agreement was never produced.

There was also a submission that cl 8 in the 1957 agreement is void for uncertainty. Clause 8 reads:

> In the event of either party hereto subsequently selling their respective land and building aforementioned to some other person, they will request such other person to enter into a fresh agreement with the other party hereto confirming and accepting the terms of this agreement with the other party hereto so far as the future operation thereof is concerned and thereafter the party so selling the land and building shall be discharged from all subsequent liability hereunder. Unless and until a fresh agreement shall have been executed as aforesaid the party selling the land and building shall remain liable for any breach of the covenants herein contained.

It was pointed out that the first sentence of cl 8 effectively provides that upon the making of the request to such other person to enter into a fresh agreement with the other party thereto upon the relevant terms, 'thereafter the party so selling the land and building shall be discharged for all subsequent liability hereunder'. It was argued, on the other hand, that the second sentence of cl 8 effectively provides that the liability of the selling party subsisted until his buyer executed a fresh agreement with the other party thereto. It was submitted that cl 8 of the 1957 agreement is therefore saddled with an inherent uncertainty which is incurable, it therefore being void in law under s 30 of the Contracts Act 1950. I disagree; the two sentences must be read together and contextually and I do not see any inconsistency.

Notwithstanding my conclusions on the other matters brought up by the third party where I have ruled against the third party, my view is that since there is no proof that was an absolute assignment of the rights and benefit under the 1957 agreement to the defendant, the third party claim by the defendant must fail.

To conclude, the claim of the plaintiff is allowed under para 5(a) of the statement of claim for the sum of RM22,792 with costs and interest at the rate of 8% per annum from the date of issue of writ to the date of realization. The third party claim of the defendant is dismissed with costs.

Plaintiff's claim allowed; third party claim dismissed with costs.

Reported by Hanim Kamaruddin